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FINAL REPORT

JOINT TORTFEASORS

& THE COMMON LAW "RELEASE BAR RULE"

Law Reform Commission of Nova Scotia
July 2002

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

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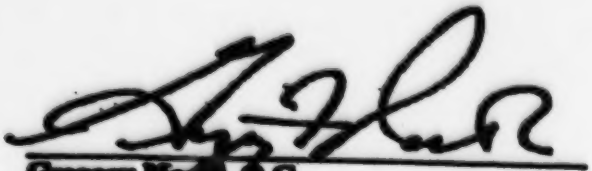
Law Reform Commission of Nova Scotia

To: The Honourable Michael G. Baker, Q.C.
Minister of Justice and Attorney General

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report, *Joint Tortfeasors & The Common Law "Release Bar Rule"*.



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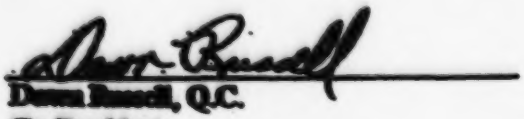

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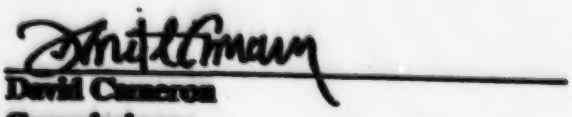

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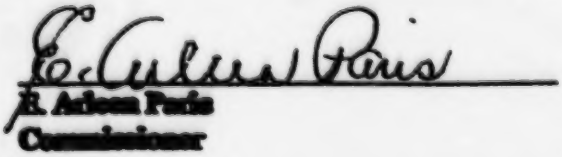

R. Arleen Paris
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TABLE OF CONTENTS

Page

Summary i

I INTRODUCTION 1

1. The project 1

2. Legal language 2

II GENERAL INFORMATION 4

III DETAILED DISCUSSION 8

1. Treatment of the rule outside Nova Scotia 8

2. Releases and formal offers of settlement 12

3. Relationship to payments into court 13

IV RECOMMENDATIONS 15

Appendix A
Nova Scotia, *Civil Procedure Rules*, r. 41.03

Appendix B
Nova Scotia, *Civil Procedure Rules*, Form 41.03A

JOINT TORTFEASORS & THE COMMON LAW "RELEASE BAR RULE"

SUMMARY

A *tort* is a type of civil wrong for which a person adversely affected or injured thereby can claim damages. *Damages* are sums of money, awarded by a court to compensate a person for loss or harm resulting from civil wrongs, including torts. A person seeking damages in the courts is the *plaintiff*, and the person against whom the plaintiff makes a claim is the *defendant*. A person who commits a tort is known as a *tortfeasor*. If the court determines that the defendant's tort has caused the plaintiff to suffer loss or harm, then the defendant is deemed legally responsible or *liable* to compensate the plaintiff. More than one tortfeasor may be involved in contributing to a tort. *Joint tortfeasors* are responsible for the same wrongful act which results in a tort.

This Final Report is concerned with the distinction at *common law* (the law contained in court decisions rather than in legislation) between a *release* and a *covenant not to sue*. A release is an act or writing by which some claim, right or interest is given up to the person against whom the claim, right or interest could have been enforced. A covenant not to sue is an agreement whereby the plaintiff releases one wrongdoer from liability, but reserves the right to sue others. At common law, a release provided by the plaintiff to one joint tortfeasor prevents a claim being made against any other joint tortfeasors. This is generally known as the "release bar rule." Where, however, a covenant not to sue is provided, the plaintiff is not prevented from making a claim against other joint tortfeasors. This distinction, which is not widely known, has been described as creating a trap for the unwary. Given the potential for unforeseen and unfair results that are associated with the distinction between a release and a covenant not to sue, the Commission decided to examine the release bar rule and propose relevant reforms.

The Commission recommends that the release bar rule, in its application to all wrongdoers, should be explicitly abolished. Elimination of the release bar rule should not, however, prevent an injured party, who wishes to do so, from expressly releasing all wrongdoers in a matter. Consistent with the approach in other jurisdictions where the release bar rule has been expressly abolished, the Commission also recommends that elimination of the release bar rule should occur through statute.

I INTRODUCTION

1. The project

A *tort* is a type of civil wrong for which a person adversely affected or injured thereby can claim damages.[1] *Damages* are sums of money, awarded by a court to compensate a person for loss or harm resulting from civil wrongs, including torts.[2] More than one tortfeasor may be involved in contributing to a tort. *Joint tortfeasors* are responsible for the same wrongful act which results in a tort.[3]

The essence of this project is the distinction at *common law*[4] between a *release*[5] and a *covenant not to sue*.[6] At common law, a release provided by an injured party to one joint tortfeasor prevents a claim being made against any other joint tortfeasors.[7] This is generally known as the "release bar rule." Where, however, a covenant not to sue is provided, an injured party is not prevented from making a claim against other joint tortfeasors.[8] This distinction is not widely known. It has been described as creating "a trap into which the unwary fall but which the clever avoid."[9]

Ordinarily, the Commission would issue a Discussion Paper on a topic. After setting out the current state of Nova Scotia law on a particular subject, the Discussion Paper would make suggestions for reform and would invite comments from interested people. Comments received would be taken into account in the preparation of a Final Report, which would contain the Commission's final recommendations for reform. As this project involves a small number of discrete issues, the Commission has decided to proceed directly to the publication of this Final Report.

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[1] See J.R. Nolan & M.J. Connolly, *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West, 1979) at 1335. Other types of civil wrongs can result from a failure to pay a debt or to respect contractual, fiduciary, or statutory obligations: see Part III.1b, below. A person who commits a tort is known as a *tortfeasor*.

[2] See J. Munkman, *Damages for Personal Injuries and Death*, 9th ed. (London: Butterworths, 1993) at 1; D.A. Dukelow & B. Nuse, *The Dictionary of Canadian Law* (Scarborough, Ont.: Carswell, 1991) at 250.

[3] New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Sydney: The Commission, 1999) (Report 89) [hereinafter N.S.W. Report] at 4.

[4] Common law is the law contained in court decisions rather than in *legislation*: Dukelow & Nuse, note 2, above, at 182. Legislation, also referred to as a *statute* or an *Act*, is law made by elected members of government.

[5] A release has been defined as the act or writing by which some claim, right or interest is given up to the person against whom the claim, right or interest could have been enforced: J.A. Yogis, *Canadian Law Dictionary* (New York: Barron's, 1998) at 229.

[6] A covenant not to sue is an agreement whereby the plaintiff releases one wrongdoer from liability, but reserves the right to sue others: N.S.W. Report, note 3, above, at 99.

[7] Note 3, above, at 99.

[8] Note 3, above, at 99.

[9] *Bryanston Finance Ltd.* v. *de Vries*, [1975] 1 Q.B. 703 at 723 (C.A.).

2. Legal language

This Final Report attempts to present legal information as clearly as possible so that people who do not have legal training can understand and comment on the Commission's recommendations for reform. There are still some situations where the language relates to specific legal concepts, and the words used will not be familiar to everyone. This section provides definitions of those words as they are used in this Final Report.

Accord & satisfaction - Agreement (accord) to accept, in discharge of a claim, something in return (satisfaction) different from or less than that to which the person who makes the acceptance is entitled.

Civil Procedure Rules - Court rules which govern how actions in Nova Scotia are commenced and how they proceed.

Common law - The law contained in court decisions rather than in legislation.

Concurrent tortfeasors - Two or more wrongdoers whose acts operate together, or concur, to produce the same loss or harm to a plaintiff.

Costs - One party's expenses, relating to an action, that the court orders the other side to pay or reimburse.

Covenant not to sue - An agreement whereby the plaintiff releases one wrongdoer from liability, but reserves the right to sue others.

Damages - Sum of money, awarded by a court to compensate a person for loss or harm resulting from the wrong of another person.

Defendant - The person against whom a plaintiff's claim is made.

Join - To sue two or more people together.

Joint & several liability - A concept whereby joint tortfeasors can be sued together (joined) and sued individually (severally) for the full amount of the plaintiff's damages.

Joint tortfeasors - Tortfeasors responsible for the same wrongful act.

known as an "Act" or a "statute."

Liability - Finding by a court that a defendant is legally responsible to compensate the plaintiff.

Parties - The plaintiffs and defendants involved in an action.

Plaintiff - A person seeking damages in the courts.

Release - The act of writing by which some claim, right or interest is given up to the person against whom the claim, right or interest could have been enforced.

Release bar rule - A common law concept whereby the pre-trial release of a joint wrongdoer by a plaintiff will also release any other joint wrongdoers.

Settlement - An agreement by the parties to a dispute.

Several tortfeasors - Tortfeasors responsible for separate, wrongful acts which contribute to the same loss or harm.

Stay - A halt to judicial proceedings, it could be temporary or permanent.

Tort - A type of civil wrong for which a person adversely affected or injured thereby can claim damages.

Tortfeasor - A person found liable by a court for having committed a tort.

II GENERAL INFORMATION

A tort is a type of civil wrong for which a person adversely affected or injured thereby can claim damages. Damages are sums of money, awarded by a court to compensate a person for loss or harm resulting from civil wrongs, including torts. Examples of torts include *negligence*, *nuisance*, and *battery*. Negligence refers to unintentional damage caused by another person's failure to take proper care.[10] Someone, for instance, who operates a boat at night without necessary lights could be found negligent if the lack of lights results in a collision with another boat. Nuisance is an activity or physical condition which causes harm or annoyance.[11] Nuisance might result where one homeowner burns trash on his or her property, even though the resulting smoke makes it too unpleasant for adjoining neighbours to venture into their backyard. Battery involves intentionally bringing about an offensive or harmful contact with another person.[12] For example, a physician who treats someone without obtaining the patient's prior consent might be committing battery.

A person seeking damages in the courts is the *plaintiff*, the person against whom the plaintiff makes a claim is the *defendant*, and the court process by which the claim is made is an *action*.[13] The plaintiff and defendant are often called the *parties* to an action. If the court determines that the defendant's tort has caused the plaintiff to suffer loss or harm, then the defendant is deemed legally responsible or *liable* to compensate the plaintiff. People found liable by a court for having committed a tort are known as *tortfeasors*.

More than one tortfeasor may be involved in contributing to a tort. *Concurrent tortfeasors* are two or more wrongdoers whose acts operate together, or concur, to produce the same loss or harm to a plaintiff. Concurrent tortfeasors can be either joint or several.[14] Joint tortfeasors are responsible for the same wrongful act.[15] A test to determine whether a joint tort is involved is to ask whether the same facts would support an action by the plaintiff against any one of the tortfeasors.[16] Joint torts usually arise when there is an employer/employee relationship, an agent/principal relationship, or a common course of action to a common end which links the

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10 Dukelow & Nuse, note 2, above, at 674.

[11] Note 2, above, at 702.

[12] Note 2, above, at 89.

[13] The right to commence a court proceeding is a *cause of action*: Dukelow & Nuse, note 2, above, at 142.

[14] N.S.W. Report, note 3, above, at ix-x.

[15] Note 3, above, at 4.

[16] R.W.M. Dias, ed., *Clerk & Lindsell on Torts*, 15th ed. (London: Sweet & Maxwell, 1982) at 142.

tortfeasors. For example, two highway workers could commit a joint tort if they both deliberately and with the same purpose throw sand at the same time through the open window of a passing bus, thereby injuring a passenger.[17]

"Several" tortfeasors are responsible for separate, wrongful acts which contribute to the same loss or harm.[18] An example involving several tortfeasors might be where the careless driving of cars A and B results in a third vehicle being forced off the road and damaged, through no fault of that third vehicle's driver. The wrongful acts of drivers A and B would be different, but they would have contributed to the same wrongful loss or harm.

In relation to joint tortfeasors, the common law developed the concept of *joint and several liability*. This means that joint tortfeasors can be sued together or *joined* in the same action and can also be sued *severally* or individually for the full amount of the plaintiff's damages.[19] The common law considers a joint tort to involve a single wrongful act, for which the plaintiff has a single, indivisible cause of action.[20] Only one judgment can be delivered, after which the cause of action is considered no longer to exist.[21] This can have a number of important consequences.[22] A court judgment against one or more joint tortfeasors can be applied or *executed* in full against any one of them. If a judgment is obtained against one joint tortfeasor, then no other joint tortfeasors can be sued with respect to the same matter (the *judgment bar rule*). Similarly, if the plaintiff agrees to a settlement before trial and *releases* one of the potential joint tortfeasors from liability, all other joint tortfeasors are also released (the *release bar rule*).[23]

By contrast, several tortfeasors are severally or individually liable for the full amount of the damages suffered by the injured party, but are not considered to be jointly liable for the wrongful act. Neither the judgment bar rule, nor the release bar rule, applies to several tortfeasors. A plaintiff who obtains a judgment or grants a release in relation to one several

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[17] That was the situation which led to the decision in *Beecham* v. *Henderson and Houston*, [1951] 1 D.L.R. 628 (B.C.S.C.).

[18] N.S.W. Report, note 3, above, at 5.

[19] Note 3, above, at 4-5.

[20] *Duck* v. *Mayeu*, [1892] 2 Q.B. 511 at 513 (C.A.).

[21] The cause of action is considered to "merge" in the judgment: J.G. Fleming, *The Law of Torts*, 7th ed. (London: Law Book Co., 1987) at 232.

[22] N.S.W. Report, note 3, above, at 5.

[23] For acceptance of the release bar rule by a Nova Scotia court, see *Dominion Coal Co.* v. *Leyland Co.*, [1930] 2 D.L.R. 558 at 561 (N.S.S.C.T.D.).The release bar rule is also referred to as the *settlement bar rule*: see, for example, N.S.W. Report, note 3, above, at 99. The release bar rule differs from another common law rule, which provides that full payment of the plaintiff's damages will discharge all other tortfeasors: G.L. Williams, *Joint Torts and Contributory Negligence* (London: Stevens & Sons, 1951) at para. 11. That latter rule exists to prevent a plaintiff from being overcompensated.

tortfeasor can still make a claim against any other several tortfeasors.[24] As a plaintiff will not be entitled to more than full compensation for a wrong or injury, then payment, whether full or partial, received from one several tortfeasor will discharge any other several tortfeasors to the same extent.[25]

A plaintiff can release a tortfeasor from liability as a goodwill gesture. More often, though, a release is part of a settlement with a tortfeasor by way of *accord and satisfaction*. This is an agreement *(accord)* to accept, in discharge of a claim, something in return *(satisfaction)* different from or less than that to which the person who makes the acceptance is entitled.[26] An accord and satisfaction is considered to end the cause of action, and therefore prevents any other legal proceedings founded on the same matter.[27]

The release bar rule applies unless the plaintiff makes clear his or her intention to preserve a right to sue other parties liable for the plaintiff's injuries.[28] The agreement whereby the plaintiff releases one joint tortfeasor, but reserves the right to sue others, is called a covenant not to sue. If the plaintiff's actions can be characterized as a covenant not to sue, rather than a release or an accord and satisfaction, the cause of action is not ended, and other joint tortfeasors can still be sued. The common law upholds the distinction between releases or accords and covenants not to sue, even though this may lead to results unforeseen by a plaintiff. If the plaintiff is careless in the language used in a settlement agreement with one joint tortfeasor, then inadvertently the plaintiff could thereby allow all other joint tortfeasors to escape responsibility for their wrong. As a result, the plaintiff might be deprived of compensation in damages to which he or she would otherwise have been entitled. The release bar rule, which can leave a plaintiff without legal recourse, has therefore been described as creating "a trap into which the unwary fall but which the clever avoid."[29]

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[24] University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Edmonton: Institute of Law Research and Reform, 1979) (Report 31) [hereinafter Alberta Report] at 28.

[25] Fleming, note 21, above, at 232.

[26] *Black's Law Dictionary*, note 1, above, at 16.

[27] R.F.V. Heuston & R.S. Chambers, *Salmond and Heuston on the Law of Torts*, 18th ed. (London: Sweet & Maxwell, 1981) at 419. Often legal texts refer to the cause of action being "destroyed" by the release or the accord and satisfaction.

[28] Inclusion of the term "release" will not by itself make the agreement between the parties a release. Rather, the court will consider the entire agreement, in an attempt to determine the parties' common intention: *Cutler* v. *McPhail*, [1962] 2 Q.B. 292 at 297.

[29] Note 9, above.

Some jurisdictions have abolished the release bar rule by statute.[30] In Nova Scotia, the release bar rule has not been abolished, but the judgment bar rule has been eliminated, through the *Tortfeasors Act*.[31]

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[30] *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 139 [hereinafter Ontario statute]; *Contributory Negligence Act*, R.S.P.E.I. 1988, c. C-21, s. 7(1)(b) [hereinafter P.E.I. statute]; *Civil Liability Act*, 1961, No. 41, s. 17 [hereinafter Irish statute]; *Tortfeasors and Contributory Negligence Act 1954*, No. 14 of 1954 [hereinafter Tasmanian statute]. Most U.S. jurisdictions have also abolished the rule: Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney-General, 1988) [hereinafter Ontario Report] at 22. The release bar rule does not pose a problem in Quebec law, where an express release granted to a joint wrongdoer would only release other joint wrongdoers to the extent of the share of the person discharged: see C.C.Q. (*Civil Code of Quebec*), art. 1690.

[31] R.S.N.S. 1989, c. 471, s. (3)(a).

III DETAILED DISCUSSION

1. Treatment of the rule outside Nova Scotia

a) express elimination

In Canada, only Prince Edward Island (P.E.I.) and Ontario have eliminated the release bar rule. The P.E.I. *Contributory Negligence Act* provides:[32]

> 7. (1) *Where two or more persons are or may be responsible for the same damage...*
> *(b) no action by the person suffering that damage against any person responsible for that damage shall be barred by reason only of the existence of a release of, or accord with, any other person responsible for that damage unless such release or accord indicates that the release or accord shall have that effect and, for this purpose, the taking of money out of court that has been paid in by a defendant is deemed conclusively an accord and satisfaction with that defendant.*

The release bar rule was also dealt with by the Uniform Law Conference of Canada (U.L.C.C.) in its *Uniform Contributory Fault Act*.[33] Section 15 of the U.L.C.C.'s *Uniform Act* would eliminate both the judgment bar and release bar rules:

> 15. *An action against one or more concurrent wrongdoers is not barred by*
> *(a) a release of any other concurrent wrongdoer, or*
> *(b) a judgment against any other concurrent wrongdoer,*
> *and may be continued notwithstanding the release or judgment.*

Other law reform agencies studying this topic have recommended abolition of the release bar rule.[34] The Alberta Institute of Law Research and Reform indicated that a release and a

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[32] P.E.I. statute, note 30, above. See also Ontario statute, note 30, above.

[33] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting*, Appendix F (Calgary, Alta., August 1984) at 98. No province has adopted the *Uniform Act*. The U.L.C.C. is an independent organization which promotes the uniformity of legislation in Canada concerning subjects for which uniformity may be found possible and advantageous.

[34] The Saskatchewan Law Reform Commission, though it has recommended elimination of the rule, confined its comments to the law of contracts. The Saskatchewan Commission suggested one would not ordinarily expect a release granted to one person liable under a contract to take away the right to sue anyone else liable in the same matter: Law Reform Commission of Saskatchewan, *Proposals Relating to Joint Obligations* (Saskatoon: The Commission, 1985) [hereinafter Saskatchewan Report] at 11. For application of the release bar rule outside of the torts context, see Part III.1b, below. The English Law Reform Commission acknowledged that a proposal for abolition of the release bar rule "clearly ha[d] some force...," but given the number of issues involved, that Commission chose to postpone the topic for future study: The Law Commission (Eng.), *Law of Contract: Report on Contribution* (London: H.M.S.O., 1977) [hereinafter English Report] at 13.

covenant not to sue are meant to accomplish the same result, namely freeing a particular tortfeasor from liability. In suggesting that distinctions be eliminated between releases and covenants not to sue, the Alberta Institute stated that the rights of the parties should be determined by the substance of an agreement and not its form.[35] The Ontario Law Reform Commission was of the view that the release bar rule "perpetuate[d] a technical distinction from a much earlier period in legal development" and "[could] lead to injustice." As a result, the Ontario Commission expressed support for an Ontario statute which eliminated the release bar rule.[36] In relation to the release bar rule, the Hong Kong Law Reform Commission commented, "the law should not set such traps."[37] As part of its reasons for proposing the rule's elimination, the New South Wales Law Reform Commission (N.S.W.L.R.C.) quoted a commentator who had called the rule "pernicious, either discouraging settlements or ensnaring the unwary."[38] Although hardly in favour of the rule, the N.S.W.L.R.C., upon further consideration, came to the view that the release bar rule need not be expressly abolished. The N.S.W.L.R.C. took the position that N.S.W. legislation which had abolished the judgment bar rule for all joint tortfeasors, thereby severing the unity of a cause of action against joint tortfeasors, implicitly did away with the basis of the release bar rule.[39] Nonetheless, in order to avoid any doubt concerning the release bar's existence, the N.S.W.L.R.C. has recommended that it should be expressly abolished for all joint wrongdoers.[40]

The language used, both in actual statutes and in law reform agency reports, has differed in terms of how to eliminate the release bar rule. Some provisions are written from the perspective of preventing what would have been the release bar rule's effect on a plaintiff's action. For example, the P.E.I. statute states that "no action...shall be barred by reason only of the existence of a release of... any other person responsible..." unless the release is stated to have that effect.[41] In New South Wales, Australia, in proceedings before the Dust Diseases

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[35] Alberta Report, note 24, above, at 29.

[36] Ontario Report, note 30, above, at 23. S. 139(1) of the Ontario statute, note 30, above, states: "Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding."

[37] Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Hong Kong: Government Printer, 1984) [hereinafter Hong Kong Report] at 16. The Hong Kong Commission suggested, however, that any legislative solution to the release bar rule should still enable a plaintiff and the original defendant to decide whether the plaintiff would be permitted to pursue a subsequent claim against any other defendants. That topic is discussed at Part III.1c, below.

[38] New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Sydney: The Commission, 1997) (Discussion Paper 38) at 147.

[39] N.S.W. Report, note 3, above, at 99-100. The legislation referred to is similar in effect to Nova Scotia's *Tortfeasors Act*, note 31, above.

[40] Note 3, above, at 99.

[41] P.E.I. statute, note 30, above. The U.L.C.C. *Uniform Act*, note 33, above, is also worded from the perspective of preventing the rule from affecting a plaintiff's action.

Tribunal, settlement with one or more joint tortfeasors "is not a bar to recovery" against other joint tortfeasors in the same matter unless the settlement terms provide otherwise.[42] The Ontario statute states that where jointly liable people are involved, "judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding."[43] The Tasmanian statute places its emphasis on preventing a wrongdoer from being discharged of his or her responsibility. It states that a release of a joint tortfeasor "does not discharge another tortfeasor unless the release so provides."[44] The Irish statute provides that the release of, or accord with, one concurrent wrongdoer discharges the other wrongdoers if it indicates such an intention.[45] This produces the same effect as the release bar rule, but only if the parties have expressed their intention for this to occur.

In terms of law reform agency suggestions, the Hong Kong Commission agreed with the approach taken in the Tasmanian statute. The Saskatchewan Law Reform Commission, though it only considered the release bar rule in the context of contract law, also placed its focus on wrongdoers: "The most straightforward solution... is to reverse the rule, so that the release of one [contracting party] does not release the others unless there is evidence of an intention to release the others."[46]

b) application outside of torts

It is not only in the context of torts where the wrongs of more than one person can cause loss or injury to someone else. A person can also suffer harm when other people fail to honour contractual obligations, to perform *fiduciary duties*,[47] to pay a debt, or to respect certain statutory requirements. The release bar is also not confined in its operation to torts. For example, it also applies to joint promisors, people who jointly promise to do something under a

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[42] New South Wales, *Dust Diseases Tribunal Act 1989*, s. 12C [hereinafter N.S.W. statute].

[43] Ontario statute, note 30, above.

[44] Tasmanian statute, note 30, above, s. 2(3)(a).

[45] Irish statute, note 30, above. The Irish provision goes on to confirm that if no such intention is indicated by the release or accord, the other wrongdoers shall not be discharged.

[46] Saskatchewan Report, note 34, above, at 11.

[47] A fiduciary is someone who occupies a position of trust (in a generic sense) or is entrusted by another for a particular purpose: M.R. Gillen & F. Woodman, eds., *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery, 2000) at 740.

contract.[48] Some approaches toward law reform have recognized this wider character of the release bar rule and have gone further than the context of torts alone.

In Ontario, the rule has been abolished with respect to all civil actions, including those relating to non-payment of debt. Ireland has eliminated the rule as it relates to all civil wrongdoers, with the definition of "wrong" including "a tort, breach of contract or breach of trust."[49] By contrast, the relevant P.E.I. statute has only eliminated the release bar rule where negligence is involved, and elimination of the rule in Tasmania is confined to joint tortfeasors alone. In its *Uniform Contributory Fault Act*, the U.L.C.C., in defining "wrongful act," included not only torts, but also "a breach of contract or statutory duty that creates a liability for damages."[50]

Other law reform agencies have taken a broad perspective in discussing abolition of the rule. The Ontario Law Reform Commission agreed with the wide scope of the Ontario statute.[51] The Hong Kong Law Reform Commission recommended that the rule should be dispensed with "in respect of any debt or damage,"[52] and the New South Wales Law Reform Commission proposed that the release bar rule should be abolished in relation to all joint wrongdoers.[53]

c) release of more than one defendant

Legislation in P.E.I., New South Wales, Ireland, and Tasmania allows the plaintiff and at least one defendant to agree that a release will also release other defendants.[54] This would accomplish the effect of the release bar rule, but only at the express wish of the parties. Law reform agencies in Hong Kong[55] and Saskatchewan[56] were in favour of this concept. The

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[48] Saskatchewan Report, note 34, above, at 11. The law treats a joint contract as involving a single promise, a single obligation to pay, and a single cause of action. By contrast, the obligations of people who make promises under independent contracts are known as separate or "several". An intermediate category is that of joint and several promisors, who share the same obligations, but who have also individually promised to do something. Generally, joint and several promisors are free from the common law rules, such as the judgment bar rule, which characterize joint promises. By virtue of some ancient case decisions, however, joint and several promisors are subject to the release bar rule: Saskatchewan Report, note 34, above, at 7-8, 11.

[49] *Civil Liability Act, 1961*, (Irl.), 1961, No. 41, s. 2.

[50] A third branch of the U.L.C.C. definition is "a failure of a person to take reasonable care of his own person, property or economic interest," regardless of whether this was intentional.

[51] Ontario Report, note 30, above, at 23.

[52] Hong Kong Report, note 37, above, at 78.

[53] N.S.W. Report, note 3, above, at 99.

[54] P.E.I. statute, note 30, above; N.S.W. statute, note 30, above; Irish statute, note 49, above; Tasmanian statute, note 30, above.

[55] Hong Kong Report, note 37, above, at 17.

[56] Saskatchewan Report, note 34, above, at 11.

Hong Kong Law Reform Commission explained, "it is quite normal in a settlement between a plaintiff and one defendant for there to be an undertaking by the plaintiff that he shall not pursue his claims against the other defendants in that action or in any other actions."[57] To accomplish this, it was suggested, the parties to a release should be able to agree and expressly indicate that the release discharges all other defendants in the action.

2. Releases and formal offers of settlement

Prior to a court providing judgment in an action, it is always open for a plaintiff and defendant to resolve their differences by means of a *settlement*, which at its most general is merely an agreement by the parties to the dispute.[58] A settlement is sometimes referred to as a *compromise and settlement*, which points out that the agreement involves concessions on both sides.[59] The Nova Scotia *Civil Procedure Rules*, which are court rules written by the judges of the Court of Appeal and of the Nova Scotia Supreme Court,[60] allow a party to an action to make a formal offer of settlement prior to the start of a trial or hearing. A party may wish to do so to avoid the risk of receiving an unfavourable decision at trial or hearing. By avoiding a trial or hearing, both parties will likely incur lower legal expenses. Filing a formal settlement offer can also benefit the party who makes it, in terms of being reimbursed by the court for a portion of *costs*.[61] For example, if a plaintiff's offer is not accepted by the defendant, and at trial the plaintiff receives an amount in damages which is as, or more, favourable than the offer to settle, the plaintiff will be reimbursed for some of his or her costs.[62] It is not clear from the *Rules* whether an accepted offer to settle by itself is to be treated as a release. R. 41A.10 indicates that "[w]here there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff...." The *Rules* do not go on to indicate, however, what would be the implications, if any, for other defendants not specifically mentioned in the accepted offer of settlement. The *Rules* also do not require the parties to create any other agreement, whether a release, accord and satisfaction, or covenant not to sue, in order to supplement the accepted offer to settle. If an accepted offer of settlement

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[57] Hong Kong Report, note 37, above at 17.

[58] Dukelow & Nuse, note 2, above, at 984.

[59] *Black's Law Dictionary*, note 1, above, at 260.

[60] The judges have the authority to create court rules by virtue of the *Judicature Act*, R.S.N.S. 1989, c. 240, ss. 2(h), 46-51.

[61] Costs are one party's expenses, relating to an action, that the court orders the other side to pay or reimburse: D. Oran & M. Tosti, *Law Dictionary for Nonlawyers*, 3rd ed. (St. Paul: West, 1991) at 69.

[62] *Civil Procedure Rules*, r. 41A.09(1). Reducing court-ordered costs may not be as important a factor where joint or joint and several defendants are involved. Generally, unless a plaintiff's offer is made to all defendants, or all defendants make an offer to the plaintiff, the cost consequences set out at r. 41A.09 do not apply to offers to settle where joint or joint and several defendants are involved: see r. 41A.10.

is indeed equivalent to a release,[63] the release bar rule might apply in the context of formal offers to settle. An unwary plaintiff might agree to something which is equivalent to a release, not knowing that because of the common law rule, all joint defendants will be released from liability.

3. Relationship to payments into court

Court rules generally allow a defendant to pay into court the amount he or she expects the court might award to the plaintiff in damages. The plaintiff is able to accept this money, in exchange for discontinuing his or her action. In Nova Scotia, if the plaintiff accepts the amount deposited, or if the amount awarded at trial is equal to or less than the sum deposited, then the defendant will not be liable for any costs incurred after the payment was made.[64] Courts usually require the losing party to pay a portion of the other side's costs.[65] The issue which arises here is whether acceptance by a plaintiff of money paid into court should be treated as a release of the defendant who paid the money. If so, then where the common law still applies, and where the payor was a joint defendant, any other joint defendants would also be released. A plaintiff could therefore inadvertently thereby suffer from the release bar rule.[66]

Some statutes have expressly dealt with this issue. For example, the P.E.I. statute states that "the taking of money out of court that has been paid in by a defendant is deemed conclusively an accord and satisfaction with that defendant."[67] As, however, the P.E.I. statute has also eliminated the release bar rule, a plaintiff who accepts money deposited in court will not unknowingly suffer the effects of the release bar rule.

Rule 41.03 of the *Civil Procedure Rules* states:

41.03. (1) *Where money is paid into court under rules 41.01, 41.02 and 41.05, a plaintiff may, while the money remains in court but before the commencement of the trial or hearing, accept the whole or any portion thereof in satisfaction of all or any of the specific causes of action in respect of which the money was paid in by*

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[63] It should not be overlooked that the release bar rule is also referred to as the settlement bar rule: N.S.W. Report, note 3, above, at 99.

[64] See r. 41.04(2).

[65] A.J. Meagher & R.A. Meagher, *Civil Procedure Simplified* (Toronto: Butterworths, 1983) at 222.

[66] In *Reaney* v. *National Trust*, [1964] 1 O.R. 461 (H.C.J.), the court treated the plaintiff's acceptance of money, paid into court by one tortfeasor, to also be a release of all other tortfeasors. Although mentioning the issue of whether the tortfeasors were joint or several, the court did not appear to resolve this question. As a result, this decision may be authority for expansion of the scope of the release bar rule, to include several tortfeasors, where a payment into court is involved.

[67] Similarly, in Tasmania, if a plaintiff accepts money deposited into court, this will be treated as an accord and satisfaction: Tasmanian statute, note 30, above, s. 2(4).

> *giving notice of the acceptance thereof in Form 41.03A to every other party and thereupon all proceedings in respect of these causes of action shall be stayed as against the defendant making the payment and any other defendant sued jointly or in the alternative with him.* [emphasis added]

By referring to defendants "sued jointly or in the alternative" this rule seems to apply to joint and several tortfeasors. It should be noted that the cause of action is merely *stayed*[68] and therefore might continue to exist. However, the *Rules* also include a Notice of Acceptance,[69] which must be agreed to by a plaintiff prior to accepting money that has been paid into court. It states that the plaintiff accepts the money offered by the defendant and agrees that all further proceedings relating to the cause or causes of action will be "abandoned." Regardless of what may be an inconsistent use of both "stayed" and "abandoned", the result of a plaintiff accepting money paid into court pursuant to Rule 41.03 seems to benefit all joint defendants, as a cause of action would be stayed "... as against the defendant making the payment and any other defendant sued jointly or in the alternative with him." If Rule 41.03 does indeed benefit all joint defendants in that fashion, the release bar rule should not be an issue in relation to payments made into court in Nova Scotia.

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[68] A stay is a halt to judicial proceedings. It could be temporary or permanent: Yogis, note 5 above, at 254.

[69] The full text of the Notice of Acceptance is at Appendix B.

IV RECOMMENDATIONS

The release bar rule furthers no public good. Moreover, application of the rule would be unfair, as it would enable certain parties to avoid their legal obligations by taking advantage of another party's ignorance of the rule and its implications. The Commission takes the position that otherwise meritorious claims should not be denied on the basis of obscure laws which are the product of outmoded legal theory, which do not reflect current notions of justice, and which provide no widespread benefit.

Nova Scotia's *Tortfeasors Act*, which abolished the judgment bar rule for all joint tortfeasors, and which thereby severed the unity of the cause of action against joint tortfeasors at common law, may have implicitly eliminated the release bar rule. Without the pronouncement of a Nova Scotia court on this issue, however, one cannot be certain. In any event, such uncertainty would be resolved by explicitly abolishing the release bar rule in Nova Scotia.

The focus of this report is on the release bar rule in the torts context. As the report explains, the rule might also apply in areas outside of torts. Having advocated that the release bar rule is unfair, the Commission is of the view that it would not be consistent to propose abolition of the rule in some instances, but to allow the rule to persist in others. The Commission therefore recommends explicitly abolishing the rule as it applies to all wrongdoers.

Having said this, the Commission appreciates there are certain contexts in which an injured party might wish to release all wrongdoers. The Commission agrees that a knowledgeable plaintiff, who consciously wishes to do so, should be able to release all joint wrongdoers named in an action. Although this would produce the same effect as an application of the release bar rule, it would be the result of an informed decision, would not stem from the plaintiff's unawareness of an obscure rule, and would be expressly done.

Consistent with the approach in other jurisdictions where the release bar rule has been expressly abolished, the Commission recommends that elimination of the release bar rule should occur through statute.

The Commission recommends:

- The release bar rule, in its application to all wrongdoers, should be explicitly abolished.
- Elimination of the release bar rule should not prevent an injured party, who wishes to do so, from expressly releasing all wrongdoers in a matter.
- Elimination of the release bar rule should occur through statute.

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APPENDIX "A"

Nova Scotia, *Civil Procedure Rules*, r. 41.03

Appendix A

Nova Scotia, *Civil Procedure Rules*, r. 41.03

Acceptance and payment out of money paid into court in satisfaction

41.03. (1) Where money is paid into court under rules 41.01, 41.02 and 41.05, a plaintiff may, while the money remains in court but before the commencement of the trial or hearing, accept the whole or any portion thereof in satisfaction of all or any of the specific causes of action in respect of which the money was paid in by giving notice of the acceptance thereof in Form 41.03A to every other party and thereupon all proceedings in respect of these causes of action shall be stayed as against the defendant making the payment and any other defendant sued jointly or in the alternative with him. [E.22/3]

(2) With leave of the court, the money so accepted in satisfaction of the causes of action specified in the notice of acceptance shall be paid out to the plaintiff or his solicitor. [E. 22/4]

APPENDIX "B"

Nova Scotia, *Civil Procedure Rules*, Form 41.03A

Appendix B

Nova Scotia, *Civil Procedure Rules*, Form 41.03A

[Rule 41.03(1)]

NOTICE OF ACCEPTANCE OF MONEY PAID INTO COURT

(Title of proceeding)

TAKE NOTICE that the plaintiff, A.B., accepts the sum of paid by the defendant C.D., into court in satisfaction of the [cause] [causes] of action for which it was paid in and agrees that all further proceedings relating to the [cause] [causes] of action shall be abandoned.

DATED the day of , 19 .

A.B., of
Street
, Nova Scotia,
Solicitor for the Plaintiff.

TO: The Parties or their solicitors